

## Boston College Law Review

---

Volume 52 | Issue 1

Article 7

---

1-1-2011

# Parents, Students, and the Pledge of Allegiance: Why Courts Must Protect the Marketplace of Student Ideas

Laura Prieston  
[laura.prieston@bc.edu](mailto:laura.prieston@bc.edu)

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Constitutional Law Commons](http://lawdigitalcommons.bc.edu/bclr/)

---

### Recommended Citation

Laura Prieston, *Parents, Students, and the Pledge of Allegiance: Why Courts Must Protect the Marketplace of Student Ideas*, 52 B.C.L. Rev. 375 (2011), <http://lawdigitalcommons.bc.edu/bclr/vol52/iss1/7>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# PARENTS, STUDENTS, AND THE PLEDGE OF ALLEGIANCE: WHY COURTS MUST PROTECT THE MARKETPLACE OF *STUDENT IDEAS*

**Abstract:** In *Frazier v. Winn*, the U.S. Court of Appeals for the Eleventh Circuit upheld as constitutional a Pledge of Allegiance statute that requires students to obtain parental permission prior to refraining from Pledge recitation in school. The decision raises controversial issues regarding the current status of the fundamental right to free speech possessed by students, espoused by the U.S. Supreme Court over sixty years ago in *West Virginia State Board of Education v. Barnette*. Particularly, where do the First Amendment rights of students stand in relation to the established rights of both parents and educational institutions? For instance, when parents and students disagree, whose rights should schools protect and promote? In light of the debate and confusion caused by recent student speech and Pledge of Allegiance cases, this Note confronts the tension among public educational institutions, parents, and students. Specifically, this Note proposes that when determining the validity of Pledge statutes in the future, the constitutional rights of students should be determinative, regardless of the opinion or rights of their parents.

## INTRODUCTION

On October 5, 2009, the U.S. Supreme Court denied a petition for writ of certiorari in *Frazier v. Winn*, a student speech case decided by the U.S. Court of Appeals for the Eleventh Circuit.<sup>1</sup> The case arose out of an incident on December 8, 2005, when Cameron Frazier, an eleventh-grade student at Boynton Beach Community High School, in Palm Beach County School District, refused to stand and recite the Pledge of Allegiance (the “Pledge”) in class.<sup>2</sup> Florida’s Pledge of Allegiance statute (the “Pledge statute”), which applies to students from kindergarten to twelfth grade, states in pertinent part:

---

<sup>1</sup> 535 F.3d 1279 (11th Cir. 2008), *cert. denied*, 130 S. Ct. 69 (2009). The writ of certiorari was denied without explanation. *See Winn*, 130 S. Ct. at 69.

<sup>2</sup> *Frazier v. Alexandre*, 434 F. Supp. 2d 1350, 1352–54 (S.D. Fla. 2006), *aff’d in part, rev’d in part sub nom. Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008). Notably, Frazier subsequently reached a legal settlement agreement with the Palm Beach County School District for \$32,500. Cara Fitzpatrick, *Pledge of Allegiance Dispute Near End*, PALM BEACH POST, Mar. 24, 2010, at B1.

The pledge of allegiance to the flag . . . shall be rendered by students . . . . The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. *Upon written request by his or her parent, the student must be excused from reciting the pledge.*<sup>3</sup>

Frazier's teacher informed him that, because he did not have written permission from his parents exempting him from the Pledge recitation, he was legally required to participate.<sup>4</sup> Frazier refused, and was removed from class and disciplined.<sup>5</sup> Following this incident, Frazier, through his mother, brought an action under 42 U.S.C. § 1983 alleging that section 1003.44 of the Florida Statutes violated his rights under the First and Fourteenth Amendments to the U.S. Constitution.<sup>6</sup> The case was eventually heard in 2008 by the Eleventh Circuit in *Winn*, where a decision was issued in favor of the state, upholding the Pledge statute.<sup>7</sup> The court quickly dismissed Frazier's primary claim that the Pledge statute violated the U.S. Supreme Court's ruling in the 1943 case of *West Virginia State Board of Education v. Barnette*,<sup>8</sup> the landmark case that first recognized a "student's right to refrain from pledge participation."<sup>9</sup> Rather, the Eleventh Circuit interpreted the Pledge statute as protecting the fundamental right of parents to control the upbringing of their children.<sup>10</sup> The court concluded that the state's interest in protecting parental rights justifies restricting students' free speech rights.<sup>11</sup>

Although that decision is now final because the Supreme Court denied the petition for certiorari, the issues it raises remain controver-

---

<sup>3</sup> FLA. STAT. ANN. § 1003.44(1) (West 2009) (emphasis added); see *Winn*, 535 F.3d at 1281.

<sup>4</sup> See *Alexandre*, 434 F. Supp. 2d at 1354.

<sup>5</sup> See *id.* Frazier was "made to sit in the office until the class period was over and was not allowed to return to the classroom that day." *Id.*

<sup>6</sup> See *id.* at 1353.

<sup>7</sup> See *Winn*, 535 F.3d at 1285–86.

<sup>8</sup> See generally 319 U.S. 624 (1943). For a more thorough discussion of this case, see *infra* notes 34–50 and accompanying text.

<sup>9</sup> See *Winn*, 535 F.3d at 1284–85.

<sup>10</sup> *Id.* at 1284 (stating that "[w]e see the statute before us now as largely a parental-rights statute," wherein a restriction on student speech protects the constitutional rights of parents).

<sup>11</sup> *Id.* at 1285 ("We conclude that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech.").

sial and are worthy of in-depth analysis.<sup>12</sup> If statutes like the one at issue in *Winn* are upheld by courts, then where does that leave the fundamental right to free speech possessed by students and previously recognized by courts?<sup>13</sup> Likewise, when parents and students disagree, should schools and courts defer to the rights of parents at the expense of the rights of students?<sup>14</sup>

The triangle of interests among parents, students, and public educational institutions has been the subject of many court cases throughout the past century, and many scholars have analyzed and assessed the rights and obligations of these parties in the context of public high schools.<sup>15</sup> Student speech cases tend to focus on the tension between a student's constitutional right to free speech and school officials' right to regulate student behavior.<sup>16</sup> Other cases focus on balancing a parent's right to control the upbringing of his or her child and a school's right to provide an appropriate education to that child.<sup>17</sup> Scholars often presuppose that students and their parents are of one mind, with the same viewpoint.<sup>18</sup> Few scholars, and few cases for that matter, focus on what happens when students and their parents disagree.<sup>19</sup> Scholars do, however, tend to agree that courts must afford relative weight to parents' rights and students' rights without eliminating either.<sup>20</sup>

Part I of this Note discusses the history of student speech rights within public high schools.<sup>21</sup> Part I also reviews the development of parental rights generally and in the context of the classroom, noting that courts are inconsistent in their sensitivity to parents' wants and desires.<sup>22</sup> Part II then considers how student and parental rights converge in case law, specifically in the area of students' First Amendment rights to free speech.<sup>23</sup> Next, Part III discusses a potential circuit split and analyzes the

---

<sup>12</sup> See *infra* notes 256–292 and accompanying text.

<sup>13</sup> See *infra* notes 256–292 and accompanying text.

<sup>14</sup> See *infra* notes 301–331 and accompanying text.

<sup>15</sup> See sources cited *infra* notes 27–133 and accompanying text.

<sup>16</sup> See cases cited *infra* notes 34–91 and accompanying text.

<sup>17</sup> See cases cited *infra* notes 92–133 and accompanying text.

<sup>18</sup> See, e.g., Ralph D. Mawdsley, *The Changing Face of Parents' Rights*, 2003 BYU EDUC. & L.J. 165, 179–83 (acknowledging that it is not clear what would happen where parents and students disagree in the context of education).

<sup>19</sup> See, e.g., *id.* at 182 (discussing the relationship between parents' rights and students' rights and asking "[t]o what extent can both students' free expression rights and parents' rights coexist in the same schools?").

<sup>20</sup> See, e.g., *id.* at 180–83.

<sup>21</sup> See *infra* notes 27–91 and accompanying text.

<sup>22</sup> See *infra* notes 92–133 and accompanying text.

<sup>23</sup> See *infra* notes 134–215 and accompanying text.

reasoning behind recent court decisions in Pledge cases.<sup>24</sup> Part IV proposes an analysis for determining the validity of Pledge statutes and confronts the role schools play in prohibiting students' free speech rights in order to advance parental rights.<sup>25</sup> This Note argues that when determining the validity of Pledge statutes, courts must consider whether the statute unreasonably infringes upon the constitutional rights of students, regardless of the opinion or rights of their parents.<sup>26</sup>

## I. THE HISTORY OF STUDENT AND PARENTAL RIGHTS IN THE SUPREME COURT

The U.S. Supreme Court jurisprudence regarding the constitutional rights of both students and parents has evolved over time from general proclamations of First and Fourteenth Amendment rights, to more limited constitutional entitlements.<sup>27</sup> In 1943, in *West Virginia State Board of Education v. Barnette*, the Court first addressed the constitutional protections of students under the First and Fourteenth Amendments.<sup>28</sup> Since *Barnette*, the Court has further clarified the rights possessed by students and has recently interpreted these rights narrowly, particularly when they conflict with the rights of public educational institutions.<sup>29</sup> Separately, the Court has also long recognized parents' right to control the upbringing and education of their children.<sup>30</sup> This Fourteenth Amendment liberty is often used as a justification in the scholarly literature for limitations on the speech rights of minors.<sup>31</sup> Because a proper analysis of the validity of Pledge statutes involves weighing the interests held by students, parents, and educational institutions, this Note first discusses the evolution and current status of student and parental rights under Supreme Court jurisprudence.<sup>32</sup>

---

<sup>24</sup> See *infra* notes 216–306 and accompanying text.

<sup>25</sup> See *infra* notes 307–331 and accompanying text.

<sup>26</sup> See *infra* notes 256–331 and accompanying text.

<sup>27</sup> See *infra* notes 34–133 and accompanying text.

<sup>28</sup> 319 U.S. 624, 630 (1943).

<sup>29</sup> See *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–73 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986).

<sup>30</sup> See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–403 (1923).

<sup>31</sup> See, e.g., John Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 323 (1979) (“[T]he complex of moral rights and obligations that characterize the parent-child relationship plays a part in shaping whatever fundamental rights children have.”).

<sup>32</sup> See *infra* notes 216–331 and accompanying text.

### A. *The Evolution of Student Speech Rights in the Supreme Court*

The Supreme Court jurisprudence regarding First Amendment student speech has evolved over time from a general pronouncement of a right to free speech to a more delineated, circumstantial right.<sup>33</sup> The Court first acknowledged students' right to freedom of thought and expression under the First Amendment in 1943 in *Barnette*.<sup>34</sup> A group of Jehovah's Witnesses brought suit challenging specific resolutions adopted by the West Virginia State Board of Education.<sup>35</sup> These resolutions required all students to recite the Pledge of Allegiance daily.<sup>36</sup> Enacted after World War II in an effort to promote national unity and teach citizenship, the resolutions mandated the expulsion of any child who failed to salute the flag.<sup>37</sup> The Court struck the statute down as violative of the constitutional freedoms of the individual protected by the First Amendment<sup>38</sup> and applied to the states through the Fourteenth Amendment.<sup>39</sup> Primarily, the Court noted that the essential conflict was between the school's authority and the rights of the individual, namely, the school student.<sup>40</sup> The Court established that Pledge recitation is a form of speech because it symbolizes the communication of ideas and opinions about our government and country.<sup>41</sup> As such, there was an inherent constitutional problem with the state conditioning access to public education on recitation of a pledge touching on "individual opinion and personal attitude."<sup>42</sup> Upholding a Pledge requirement, the Court reasoned, would be akin to compelling individuals to profess

---

<sup>33</sup> See *Morse*, 551 U.S. 409–10; *Kuhlmeier*, 484 U.S. at 270–73; *Fraser*, 478 U.S. at 685–86; *Barnette*, 319 U.S. at 631–34. For a brief overview of Supreme Court student speech jurisprudence, see Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students' Online Activity*, 50 B.C. L. REV. 1563, 1570–75 (2009).

<sup>34</sup> *Barnette*, 319 U.S. at 631–34.

<sup>35</sup> *Id.* at 626 & n.2, 629.

<sup>36</sup> *Id.* at 626.

<sup>37</sup> See *id.* at 626, 631. The statute stated that "refusal to salute the Flag [shall] be regarded as an Act of insubordination, and shall be dealt with accordingly." *Id.* at 626.

<sup>38</sup> See U.S. CONST. amend. I. The First Amendment to the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

<sup>39</sup> See U.S. CONST. amend. XIV, § 1; *Barnette*, 319 U.S. at 642.

<sup>40</sup> See *Barnette*, 319 U.S. at 630.

<sup>41</sup> See *id.* at 632–34.

<sup>42</sup> See *id.* at 630–31. The Court went on to emphasize that "we are dealing with a compulsion of students to declare a belief," and "compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." *Id.* at 631, 633.

what they do not believe, which is wholly incompatible with the Bill of Rights.<sup>43</sup>

The Court held that boards of education must respect the First Amendment rights of students.<sup>44</sup> The Court acknowledged its limited competence in the area of public education and recognized that schools have sensitive, specific, and necessarily discretionary functions.<sup>45</sup> Nevertheless, the Court held that “educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>46</sup> Deference to school officials was insufficient to justify forced political speech and infringement upon individual liberties.<sup>47</sup> Thus, the Court determined that students in public schools may not be compelled to salute the flag as to do so would deny rights inherent in the Constitution.<sup>48</sup> *Barnette* stands as the fundamental case addressing students’ First Amendment rights in the school context.<sup>49</sup> This landmark opinion underlies all subsequent analyses of Pledge statutes in schools.<sup>50</sup>

In 1969, the Court more clearly acknowledged the right of students to free speech in *Tinker v. Des Moines Independent Community School District*.<sup>51</sup> *Tinker* involved a challenge by John Tinker, Mary Beth Tinker, and Christopher Eckhardt, all students in the Des Moines public school system.<sup>52</sup> The children were suspended after wearing black armbands to school to publicize their objections to the Vietnam War.<sup>53</sup> The students, through their fathers, sought to recover nominal damages and an injunction against enforcement of a regulation adopted by Des Moines school principals that prohibited students from wearing black armbands while in school facilities or on school property.<sup>54</sup> In its analysis, the Court understood the tension to lie between the students’ right to free speech and expression and the school administrators’ right to

---

<sup>43</sup> *Id.* at 634.

<sup>44</sup> *See id.* at 637 (stating that the delicate and important function of the boards of education must be performed within the limits of the Bill of Rights).

<sup>45</sup> *Id.* at 637, 640.

<sup>46</sup> *Barnette*, 319 U.S. at 637.

<sup>47</sup> *Id.* at 637, 639.

<sup>48</sup> *Id.* at 642.

<sup>49</sup> *See id.*

<sup>50</sup> *See id.*

<sup>51</sup> 393 U.S. 503, 506 (1969).

<sup>52</sup> *Id.* at 504.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* The principals adopted the regulation after becoming aware of the students’ plan to wear armbands. *Id.*

maintain order and safety.<sup>55</sup> The Court acknowledged the “special characteristics of the school environment” and confirmed the state’s authority to control conduct in schools.<sup>56</sup> Still, the Court famously rejected the notion that “either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>57</sup> The Court concluded that students hold fundamental rights to free speech that must be recognized by states.<sup>58</sup> Without a constitutionally valid reason for restricting such rights, students should be able to freely express their beliefs.<sup>59</sup> The Court also understood student speech as part of the “marketplace of ideas”<sup>60</sup> and noted that intercommunication between students plays a vital role in students’ educational experience and personal growth.<sup>61</sup>

Although *Tinker* was protective of students’ First Amendment rights, the Court has since made clear that student speech rights are not “coextensive with the rights of adults in other settings.”<sup>62</sup> Over time, the Court has become less protective of speech in school environments in favor of deference to school administrators.<sup>63</sup> For instance, in the 1986 case of *Bethel School District No. 403 v. Fraser*, the Court ruled that a school may discipline a student for use of sexually explicit language at a school assembly.<sup>64</sup> The Court showed less concern for students’ rights to free speech as for a school’s need to inculcate values and teach students appropriate behavior.<sup>65</sup> The Court noted that, unlike in *Tinker*, the student speech at issue involved no political viewpoint; the Court thus deferred to the school’s effort to teach students important and necessary principles and morals.<sup>66</sup>

---

<sup>55</sup> See *id.* at 507; see also Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1038–40 (2008) (analyzing the way in which the Court balances the student interests and the state interests at stake in *Tinker*).

<sup>56</sup> *Tinker*, 393 U.S. at 506, 507.

<sup>57</sup> *Id.* at 506.

<sup>58</sup> *Id.* at 511.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (internal quotation marks omitted); see Papandrea, *supra* note 55, at 1040 (noting that the *Tinker* Court recognized that whether in the classroom or on the playground, student speech is crucial to the educational system as a “marketplace of ideas”).

<sup>61</sup> *Tinker*, 393 U.S. at 512.

<sup>62</sup> *Fraser*, 478 U.S. at 682.

<sup>63</sup> See ERWIN CHEMERINKSY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1150, 1151 (3d ed. 2006).

<sup>64</sup> See *Fraser*, 478 U.S. at 685.

<sup>65</sup> See *id.* at 681.

<sup>66</sup> See *id.* at 680–81. The Court determined it to be the function of schools to instill “fundamental values necessary to the maintenance of a democratic political system.” *Id.* at



The Supreme Court continued to restrict student speech rights, specifically in school newspapers, in the 1988 case of *Hazelwood School District v. Kuhlmeier*.<sup>67</sup> The Court ruled that a high school principal's decision to excise material from a student-run, school-funded newspaper that was part of the journalism curriculum, did not violate students' speech rights.<sup>68</sup> The Court deferred to the principal's decision that the material, regarding sexual activity and birth control, was inappropriate.<sup>69</sup> The Court also emphasized the school's authority to restrict expressive activity that might reasonably be perceived as endorsed by the school.<sup>70</sup> Here, because the school newspaper was part of the school curriculum, the speech could be thought to bear the imprimatur of the school and therefore to represent the view of the school district.<sup>71</sup> Thus, the Court held that educators may restrict student speech in school-sponsored activities if "their actions are reasonably related to legitimate pedagogical concerns."<sup>72</sup>

In 2007, in *Morse v. Frederick*, the Court limited student speech rights when such speech involves the endorsement of drug use.<sup>73</sup> The *Morse* Court held that school officials did not violate the First Amendment by confiscating a student banner that could be reasonably regarded as promoting illegal drug use.<sup>74</sup> Joseph Frederick, a high school student, was suspended after he opened a banner containing the phrase "BONG HiTS 4 JESUS" at a school-approved, school-supervised event.<sup>75</sup> In general, the Court emphasized that its holding was limited to speech concerning illegal drug use, specifically noting the school's compelling interest in preventing drug use among students.<sup>76</sup>

In 2004 the Court heard a case involving the requirements of California's Pledge statute—seemingly of conclusive relevance in Pledge cases but decided on justiciability grounds—in *Elk Grove Unified School District v. Newdow*.<sup>77</sup> In *Newdow*, the father of an elementary school student brought suit on his own behalf and on behalf of his daughter as

---

681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)) (internal quotation marks omitted).

<sup>67</sup> *Kuhlmeier*, 484 U.S. at 266–67.

<sup>68</sup> *Id.* at 273.

<sup>69</sup> *See id.* at 263.

<sup>70</sup> *Id.* at 271.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 273.

<sup>73</sup> *See Morse*, 551 U.S. at 403.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.* at 397–98.

<sup>76</sup> *See id.* at 407, 409–10.

<sup>77</sup> 542 U.S. 1, 7–8 (2004).

next friend<sup>78</sup> to challenge the constitutionality of a California law<sup>79</sup> that required every public elementary school in the state to begin each day with appropriate patriotic exercises.<sup>80</sup> The Elk Grove Unified School District implemented the state law by enforcing a policy requiring the daily recitation of the teacher-led Pledge.<sup>81</sup> Consistent with *Barnette*, the school district policy “permit[ted] students who object[ed] on religious grounds to abstain from the recitation.”<sup>82</sup> The student’s father claimed, however, that because the Pledge contains the words “under God,” the school policy amounted to religious indoctrination of his daughter in violation of the First Amendment.<sup>83</sup> Not addressing the substantiality of the father’s claim, the Court upheld the district court’s dismissal of the case because the father lacked standing as a non-custodial parent.<sup>84</sup>

Still, *Newdow* does have some relevance in Pledge cases because the Court noted that though students are permitted to abstain from Pledge recitation, state and local regulations that offer students the opportunity to recite the Pledge are consistent with Supreme Court jurisprudence.<sup>85</sup> Thus, *Newdow* is an important constraint on First Amendment rights for students in public schools challenging Pledge statutes.<sup>86</sup>

At present, the holding of *Tinker* has not been overruled and still protects the First Amendment free speech rights of students in public schools.<sup>87</sup> Although still good law, the subsequent cases discussed in this Section indicate that *Tinker*’s reach has been narrowed and that students’ rights are not equivalent to the rights of adults.<sup>88</sup> Importantly, however, the cases restricting student speech involve weighing the in-

---

<sup>78</sup> “Next friend” refers to a person who “appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian.” BLACK’S LAW DICTIONARY 1142 (9th ed. 2009).

<sup>79</sup> See CAL. EDUC. CODE § 52720 (West 2006).

<sup>80</sup> *Newdow*, 542 U.S. at 8.

<sup>81</sup> *Id.* at 7–8.

<sup>82</sup> *Id.* at 8 (citing *Barnette*, 319 U.S. at 624).

<sup>83</sup> *Id.* at 5.

<sup>84</sup> *Id.* at 17–18.

<sup>85</sup> *Id.* at 8 (citing *Barnette*, 319 U.S. at 624).

<sup>86</sup> See *Newdow*, 542 U.S. at 7–8. *Newdow* is also cited and discussed in more recent Pledge cases for the simple fact that it is the most recent Supreme Court case dealing with Pledge statutes. See *Circle Sch. v. Pappert*, 381 F.3d 172, 178 (3d Cir. 2004); *Frazier v. Alexandre*, 434 F. Supp. 2d 1350, 1365–66 (S.D. Fla. 2006), *aff’d in part, rev’d in part sub nom. Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008).

<sup>87</sup> See generally Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167 (2009) (analyzing the debilitating effect recent cases like *Fraser*, *Kuhlmeier*, and *Morse* had on *Tinker*’s holding but concluding that *Tinker* is viable and still provides significant protection to the First Amendment rights of students).

<sup>88</sup> See *Fraser*, 478 U.S. at 682; Calvert, *supra* note 87, at 1173.

terests between students' rights and those of public schools' prerogatives.<sup>89</sup> Over time, the balance has tipped more regularly towards public schools as the Court has become increasingly deferential to the authority of public educational institutions to maintain order and control student conduct.<sup>90</sup> In the line of cases limiting the scope of *Tinker* and the First Amendment rights of students, the Court rarely discusses the significance of parental rights or the role of parents in supporting or opposing their child's actions in any given case.<sup>91</sup>

### B. *Evolution of Parental Rights in the Supreme Court*

Parental choice is a long-recognized right in Supreme Court jurisprudence and is often used as a justification for restrictions on student speech.<sup>92</sup> The natural authority of parents to raise their children was initially described as a constitutional right by the Court in *Meyer* in 1923<sup>93</sup> and in *Pierce* in 1925.<sup>94</sup> This relationship between parents and their children is often cited by scholars as a reason for limiting the speech of minors.<sup>95</sup> Parents certainly have much at stake regarding their children's education and upbringing;<sup>96</sup> in the words of one scholar, "Parents are generally the people who know their children best, love them most, and are charged with their everyday welfare."<sup>97</sup> In light of the custodial relationship, there is a respect in the law for parents' views of what is in their children's best interests.<sup>98</sup>

Prior to *Meyer* and *Pierce*, states used common law to settle disputes between schools and parents regarding mandated activities or curriculum in schools.<sup>99</sup> A number of court decisions upheld objections to re-

---

<sup>89</sup> See *supra* notes 62–76 and accompanying text.

<sup>90</sup> See CHEMERINSKY, *supra* note 63, at 1150.

<sup>91</sup> See *supra* notes 62–76 and accompanying text.

<sup>92</sup> See *infra* notes 93–133 and accompanying text.

<sup>93</sup> 262 U.S. at 400 ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.").

<sup>94</sup> 268 U.S. at 534–35.

<sup>95</sup> See Garvey, *supra* note 31, at 323; Papandrea, *supra* note 55, at 1083 ("Until children reach the age of majority, they are subject to extensive parental control."); Catherine Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 473–83 (2000) (discussing the government's reliance on the idea that empowering parents to enforce the rules they impose on their children actually serves to better protect children).

<sup>96</sup> See Maxine Eichner, *School Surveys and Children's Education: The Argument for Shared Authority Between Parents and the State*, 38 J.L. & EDUC. 459, 459–61 (2009).

<sup>97</sup> *Id.* at 461–62.

<sup>98</sup> See *id.* at 461–65.

<sup>99</sup> See Mawdsley, *supra* note 18, at 166 & n.4.

quired courses either because of the strong interest parents have in their children's upbringing or because the request did not disrupt the school environment.<sup>100</sup> But the success of parental common law claims varied from state to state, and there are many instances where courts expressed fear that challenges to school regulations produced disrespect for the authority of public schools.<sup>101</sup>

Thus, *Meyer* and *Pierce* were significant for clarifying the Supreme Court's position on the extent of constitutional protections for parental authority.<sup>102</sup> *Meyer* involved a facial challenge to the constitutionality of a Nebraska compulsory attendance statute that prohibited instruction of any subject in any language other than English.<sup>103</sup> When a teacher in a religious school was charged with criminal penalties for teaching reading in German, the Court struck down the statute as violative of the liberty clause of the Fourteenth Amendment.<sup>104</sup> Parents had placed their children in the religious school because they wanted their children to be taught in German.<sup>105</sup> The Court thus held that it is the natural duty of parents to provide their children with education, and therefore parents have a constitutional right to direct the education of their children as they choose.<sup>106</sup>

---

<sup>100</sup> See *id.* at 167 & nn.9–10.

<sup>101</sup> See *id.* at 168 & nn.12–13 (noting that in order to avoid such a result, some courts presumed schools' actions to be reasonable).

<sup>102</sup> See *Meyer*, 262 U.S. at 400–01.

<sup>103</sup> *Id.* at 396–97. The statute provided that:

Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.

Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100), or be confined in the county jail for any period not exceeding thirty days for each offense.

Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval.

*Id.* at 397.

<sup>104</sup> See *id.* at 403.

<sup>105</sup> See *id.* at 400.

<sup>106</sup> *Id.*; see Mawdsley, *supra* note 18, at 169 n.18.

The Court expanded the protected categories under the liberty clause to include parent choice of education: "While this court has not attempted to de-

In *Pierce*, the Court held Oregon's Compulsory Education Act, which required parents to send children between ages eight and sixteen to public school, to be invalid on its face.<sup>107</sup> When two non-public schools challenged the statute as unconstitutional under the Liberty and Property Clauses of the Fourteenth Amendment, the Court invalidated the Act.<sup>108</sup> In so doing, the Court relied on *Meyer* and held that the state statute unreasonably interfered with the established right of parents and guardians to control the direction and teaching of their children.<sup>109</sup> Here, parents could choose to send their children to non-public school if they so desired.<sup>110</sup> Hence, *Pierce* marks a clear pronouncement of parental rights in the education context.<sup>111</sup>

Nearly fifty years later, in 1972, the Supreme Court again appeared to affirm the constitutional protection for parental choice, once more in the education context, in *Wisconsin v. Yoder*.<sup>112</sup> Unlike *Meyer* and *Pierce*, which both involved facially unconstitutional state statutes,<sup>113</sup> *Yoder* addressed a facially constitutional state statute that, when applied specifically to an Amish family, was ruled to be unconstitutional.<sup>114</sup> In *Yoder*, an Amish family claimed that the Wisconsin compulsory atten-

---

fine with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Mawdsley, *supra* note 18, at 169 n.18 (quoting *Pierce*, 268 U.S. at 399).

<sup>107</sup> *Pierce*, 268 U.S. at 529–31. The act at issue required:

[E]very parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him to a public school for the period of time a public school shall be held during the current year in the district where the child resides; and failure so to do is declared a misdemeanor.

*Id.* at 530–31 (internal quotation marks omitted).

<sup>108</sup> *See id.* at 534–35.

<sup>109</sup> *Id.* ("[W]e think it entirely plain that the [state statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children . . .").

<sup>110</sup> *See id.*

<sup>111</sup> *Id.* at 535 ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

<sup>112</sup> 406 U.S. 205, 232–34 (1972).

<sup>113</sup> *See Pierce*, 268 U.S. at 529–30, 534–35; *Meyer*, 262 U.S. at 399, 400.

<sup>114</sup> *See Yoder*, 406 U.S. at 207, 234–35.

dance statute was invalid under the Free Exercise Clause of the First Amendment.<sup>115</sup> The respondents argued that their children's attendance at public or private schools until age sixteen, as required by the statute,<sup>116</sup> was contrary to Amish religion and culture.<sup>117</sup> In response to the state's contention that education is necessary to effectively prepare citizens for democratic society,<sup>118</sup> the Court acknowledged that the Amish view secondary school as an environment hostile to Amish beliefs and that "Amish society emphasizes informal learning-through-doing."<sup>119</sup> Moreover, the Amish expressed concern regarding the preservation of their three hundred-year-old religion if such a statute were upheld.<sup>120</sup> The Court determined that the Wisconsin law heightened the possibility that children may not return to Amish culture if they are compelled to attend traditional public or private schools against the will of their parents.<sup>121</sup> As a result, the Court refused to enforce the law against the Amish plaintiffs and invalidated the compulsory education statute.<sup>122</sup> In short, weighing the interests of the state against those of the parents, the Court ruled in favor of the parents' interest in directing the education of their children.<sup>123</sup>

Although *Yoder* may seem to provide additional support for the right of parents to direct the education of their children described in *Meyer* and *Pierce*, some scholars argue that *Yoder* in fact limits this parental authority.<sup>124</sup> Arguably, *Yoder* restricts Liberty Clause protection to threatened religious beliefs and perhaps only to those religious groups whose "life style" [has] not altered in fundamentals for centuries."<sup>125</sup> Accordingly, the holding may not reach further than the Amish community.<sup>126</sup>

---

<sup>115</sup> *See id.*

<sup>116</sup> WIS. STAT. § 118.15 (1969).

<sup>117</sup> *Yoder*, 406 U.S. at 208–09.

<sup>118</sup> *Id.* at 221. The state argued that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society." *Id.*

<sup>119</sup> *See id.* at 211.

<sup>120</sup> *See id.* at 218–19.

<sup>121</sup> *See id.*

<sup>122</sup> *Id.* at 234.

<sup>123</sup> *See Yoder*, 406 U.S. at 234. The Court explained the parental interest as "one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Id.* at 216.

<sup>124</sup> *See, e.g.,* Mawdsley, *supra* note 18, at 172 (noting that subsequent state and federal courts have wrestled with the application of the *Meyer-Pierce-Yoder* trilogy).

<sup>125</sup> *See id.* at 172 & n.33 (quoting *Yoder*, 406 U.S. at 217).

<sup>126</sup> *See, e.g.,* Fellowship Baptist Church v. Benton, 815 F.2d 485, 496–98 (8th Cir. 1987) (upholding the application of Iowa's teacher certification requirement to a religious

In fact, time has shown that *Yoder* represents a peak for parents' religious-based educational decisions on behalf of their children.<sup>127</sup> The decision's impact on parental rights in general is less clear.<sup>128</sup>

Significantly, the Court in *Yoder* made clear that its opinion does not consider a situation where a child who expresses a desire to attend public high school in conflict with the wishes of his or her parents is prevented from doing so.<sup>129</sup> The case solely addresses a conflict between the rights of the state vis-à-vis educational institutions and the authority of parents to direct the upbringing of their children.<sup>130</sup>

Thus, the current state of the law appears to be that although parents have clear constitutional rights under the Fourteenth Amendment, the extent of these rights, particularly in relation to the First Amendment rights of their children, is unclear.<sup>131</sup> The Supreme Court cites to parental authority in upholding certain speech regulations aimed at children, but the use of this justification for restricting juvenile speech rights has yielded inconsistent results and may be unwarranted.<sup>132</sup> It may be that each parental authority case can be read narrowly and, in this way, can offer overwhelming precedential value in today's Pledge cases.<sup>133</sup>

---

school even though the teachers may not be religiously acceptable and dismissing the parents' claim that they be treated like the Amish in *Yoder* because they would not suffer as much harm as the Amish if the Amish were required to attend traditional schools after eighth grade).

<sup>127</sup> See Mawdsley, *supra* note 18, at 172–74 (discussing the retrospective meaning of *Yoder* for parents' religious-based claims).

<sup>128</sup> See *id.*

<sup>129</sup> See *Yoder*, 406 U.S. at 231. The Court went on to say that “[t]here is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation.” *Id.*

<sup>130</sup> See *id.* “The Court’s analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other.” *Id.* at 241 (Douglas, J., dissenting in part).

<sup>131</sup> See Keola R. Whittaker, *Gay-Straight Alliances and Free Speech: Are Parental Consent Laws Constitutional?*, 24 BERKELEY J. GENDER L. & JUST. 48, 60 (2009) (“Case law relating to parental authority clearly limits governmental intrusion into parental decision making. What remains unclear is whether the State may use parental authority to indirectly limit constitutional rights that the State may not limit directly.”); *supra* notes 112–130 and accompanying text.

<sup>132</sup> See Papandrea, *supra* note 55, at 1083–84.

<sup>133</sup> See Mawdsley, *supra* note 18, at 174 (noting that when considering parental claims, “courts tended to reduce their compelling interest test to one of reasonableness”).

## II. STUDENT SPEECH, PARENTS, AND THE PLEDGE OF ALLEGIANCE: THE CONFLICTING CASE LAW

Recently, there have been inconsistent developments regarding student speech rights and the Pledge.<sup>134</sup> In the past decade, Pennsylvania and Florida have both enacted somewhat different Pledge statutes that have met with varying results in court.<sup>135</sup> In determining the validity of these statutes, district and circuit courts have addressed the constitutional rights and concerns of both students and parents in Pledge recitation requirements.<sup>136</sup> The courts have weighted the interests at stake differently, thereby creating a conflict in the law.<sup>137</sup>

### A. *The Pennsylvania Approach: Circle School v. Pappert*

In 2004, in *Circle School v. Pappert*, the U.S. Court of Appeals for the Third Circuit struck down a Pennsylvania statute that required notification to a parent when any child refused to salute the flag or recite the Pledge.<sup>138</sup> The statute at issue in *Circle School* stated:

Students may decline to recite the Pledge of Allegiance and may refrain from saluting the flag on the basis of religious conviction or personal belief. The supervising officer of a school subject to the requirements of this subsection shall provide written notification to the parents or guardian of any student who declines to recite the Pledge of Allegiance or who refrains from saluting the flag.<sup>139</sup>

A public school student, through his parents as next friends, and public school parents brought a § 1983 action, challenging the statute as unconstitutional under the First and Fourteenth Amendments.<sup>140</sup> The public school student claimed the statute violated his free speech rights, and the parents claimed the statute unconstitutionally restricted

---

<sup>134</sup> See *infra* notes 135–215 and accompanying text.

<sup>135</sup> See FLA. STAT. ANN. § 1003.44(1) (West 2009); 24 PA. STAT. ANN. § 7-771(c)(1) (West 1992), *invalidated by* Circle Sch. v. Pappert, 381 F.3d 172 (3d Cir. 2004); *infra* notes 138–215 and accompanying text.

<sup>136</sup> See *Frazier v. Alexandre*, 434 F. Supp. 2d 1350, 1362–68 (S.D. Fla. 2006), *aff'd in part, rev'd in part sub nom.* *Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008); *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616, 621–27 (E.D. Pa. 2003), *aff'd sub nom.* *Circle Sch. v. Pappert*, 381 F.3d 172 (3d Cir. 2004).

<sup>137</sup> See *infra* notes 216–306 and accompanying text.

<sup>138</sup> 381 F.3d at 174.

<sup>139</sup> 24 PA. STAT. ANN. § 7-771(c)(1).

<sup>140</sup> See *Circle School*, 381 F.3d at 175–76. Two parents of private school students and several non-religious private schools were also parties to the suit. *Id.*



their right to direct the upbringing of their children.<sup>141</sup> The U.S. District Court for the Eastern District of Pennsylvania found that the parental notification provision violated the free speech rights of students.<sup>142</sup> The district court noted that “[t]here can be no doubt that the parental provision of Section 7-771(c)(1) would chill the speech of certain students who would involuntarily recite the Pledge . . . rather than have a notice sent to their parents.”<sup>143</sup> Looking to the standard set forth by the Supreme Court in *Tinker v. Des Moines Independent Community School District* in 1969, the district court determined that the school had failed to prove that notifying parents of noncompliance was required to prevent a substantial disruption in schools.<sup>144</sup> Rather, the district court reaffirmed the constitutional protections for free expression proclaimed by the Supreme Court in the 1943 case of *West Virginia State Board of Education v. Barnette*<sup>145</sup>—specifically, that students maintain First Amendment free speech right protections in school.<sup>146</sup>

The district court also agreed that the statute unconstitutionally violated the parents’ right to direct the education of their children, failing a strict scrutiny analysis.<sup>147</sup> The reasons for the statute did not justify limiting parents’ right to control the education of their children in this instance.<sup>148</sup> Conclusively, the court issued a permanent injunction against enforcement of the Pledge statute.<sup>149</sup>

The Commonwealth of Pennsylvania appealed the matter in 2004 to the U.S. Court of Appeals for the Third Circuit.<sup>150</sup> There, the circuit court affirmed the lower court’s decision.<sup>151</sup> Ruling in favor of the stu-

---

<sup>141</sup> *Id.*

<sup>142</sup> *Phillips*, 270 F. Supp. 2d at 625–26.

<sup>143</sup> *Id.* at 624.

<sup>144</sup> *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (stating that restrictions on student speech may be justified if such speech can reasonably be interpreted as creating a substantial disruption); *Phillips*, 270 F. Supp. 2d at 624.

<sup>145</sup> *Phillips*, 270 F. Supp. 2d at 625 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943)) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

<sup>146</sup> *See id.*

<sup>147</sup> *See id.* at 626–27. More specifically, the district court was unconvinced that this statute amounted to the least restrictive means of advancing the compelling governmental interest of teaching patriotism and civics. *See id.*

<sup>148</sup> *See id.*

<sup>149</sup> *Id.* at 632–33.

<sup>150</sup> *Circle School*, 381 F.3d at 177.

<sup>151</sup> *Id.* at 181. The Third Circuit chose not to decide the constitutionality of the parents’ Liberty Clause claim because the court had already ruled the Pledge statute to be

dent-plaintiffs, the Third Circuit held that the statute's parental notification clause constituted viewpoint discrimination in violation of the First Amendment because it essentially promoted Pledge recitation and thus discriminated against students based upon their opinions as to Pledge participation.<sup>152</sup>

The Third Circuit first addressed whether the parental notification provision of Section 7-771(c)(1) constituted viewpoint discrimination in violation of the First Amendment.<sup>153</sup> It looked to the line of cases beginning with *Barnette* that consider the balance between the First Amendment rights of students and the "special characteristics" of the school environment.<sup>154</sup> The Commonwealth argued that the student opt-out provision and parental notification mechanism properly balanced the rights of the Commonwealth with those of the parents and students.<sup>155</sup> Moreover, the Commonwealth contended that the parental notification system served an important administrative function.<sup>156</sup>

To substantiate its argument, the Commonwealth claimed that the parental notification provision was consistent with parental notification requirements in the context of abortions by minors.<sup>157</sup> The Supreme Court had previously upheld the validity of state statutes that require physicians to alert parents or guardians prior to performing abortions on minor women.<sup>158</sup> The Commonwealth pointed to the relationship between the rights of parents to control their children and the rights of

---

unconstitutional under two other claims. *See id.* at 183 (stating that because the Act violated the rights of both the student-plaintiff and private school-plaintiffs, it was unnecessary to address the constitutionality of the Act as to the parent-plaintiffs).

<sup>152</sup> *Id.* at 180.

<sup>153</sup> *See id.* at 177.

<sup>154</sup> *See id.* at 177–78 (stating that the court examines the parental notification clause in light of previous jurisprudence regarding the First Amendment rights of students in public schools).

<sup>155</sup> *See id.* at 178.

<sup>156</sup> *Circle School*, 381 F.3d at 178–79 ("While notification provisions may at times appear punitive, the purpose of the notification system, as designed in the Act, simply serves an administrative function, designed to efficiently inform all parents of an aspect of their children's education." (internal quotation marks omitted)).

<sup>157</sup> *See id.* at 179 (discussing the line of abortion cases where parental notification requirements were upheld as long as there existed a judicial bypass provision). In those cases, the Supreme Court stated that the maturity level of minors affected their ability to make informed and consequential choices. *See* *H.L. v. Matheson*, 450 U.S. 398, 408–13 (1981) (relying in part on *Bellotti v. Baird*, 443 U.S. 622, 640 (1979)); *Circle School*, 381 F.3d at 179 (citing *Matheson*, 450 U.S. at 408–13).

<sup>158</sup> *See Matheson*, 450 U.S. at 408–13 (relying in part on *Bellotti*, 443 U.S. at 640); *Circle School*, 381 F.3d at 179.

minors in these cases and advocated the use of the same reasoning for the parental notification statute at issue.<sup>159</sup>

The Third Circuit determined that the Commonwealth's reliance on abortion cases was "fundamentally misplaced" and that the balancing of parent and student interests done in abortion cases is unwarranted in free speech cases involving education.<sup>160</sup> The court ruled that the right of students not to have their parents notified of Pledge non-compliance existed independently of whether the parents had an interest in knowing about such noncompliance.<sup>161</sup>

After reasserting the First Amendment protections of students, the Third Circuit affirmed the district court's holding that the parental notification provision constituted viewpoint discrimination.<sup>162</sup> Because the notification clause was only triggered when students choose *not* to recite the Pledge, it differentiated among students based on the viewpoints they expressed.<sup>163</sup> The Third Circuit also agreed that a parental notification clause that applies only to students who choose *not* to participate may chill speech by providing a disincentive to nonparticipa-

---

<sup>159</sup> *Circle School*, 381 F.3d at 179.

<sup>160</sup> *See id.* The Third Circuit rejected the use of reasoning from abortion cases to support the constitutionality of parental notification, stating:

[I]t is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake . . . . Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.

*Id.* at 179–80 (quoting *Barnette*, 319 U.S. at 639).

<sup>161</sup> *See id.* at 180–81. In response, one scholar even argues that *Circle School* effectively removes parents from the "pledge statute equation." Ralph D. Mawdsley, Commentary, *The Third Circuit Court of Appeals Strikes Down Pennsylvania's Pledge of Allegiance Statute: What Are the Implications for Education?*, 196 EDUC. L. REP. 1, 15 (2005) ("Not only were the Parent-plaintiffs in *Circle School* forestalled from preventing the pledge being conducted, but future parents not objecting to the pledge would likewise be forestalled from compelling schools to furnish notices of noncompliance.").

<sup>162</sup> *Circle School*, 381 F.3d at 180. The Third Circuit stated that when government regulations go beyond content discrimination and amount to distinctions based on the speaker's view, such "viewpoint discrimination is . . . an egregious form of content discrimination." *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

<sup>163</sup> *Id.* The Third Circuit noted that if a student recites the Pledge and "thereby adopt[s] the specific expressive messages symbolized by such an act," the parental notification provision is not triggered. *Id.* If a student refuses to participate in Pledge recitation, however, this leads to a written notice to his or her parents or guardians and could result in parental sanctions. *Id.*

tion.<sup>164</sup> Therefore, the provision could only be constitutional if it withstood strict scrutiny analysis.<sup>165</sup>

The Third Circuit concluded that the Commonwealth offered no compelling governmental interest furthered by the parental notification clause.<sup>166</sup> Primarily, the administrative justification appeared “make-weight” and entirely unpersuasive.<sup>167</sup> But, more importantly, the stated interest of parental notification was not compelling enough to justify expressive discrimination that infringed upon the established First Amendment rights of students.<sup>168</sup> As such, the Third Circuit affirmed the ruling of the district court and held that the parental notification clause unconstitutionally violated students’ free speech rights.<sup>169</sup>

Broadly, this case considered both a student’s constitutional right to refrain from Pledge participation and a parent’s statutory right to information about their child’s choice.<sup>170</sup> Yet, the Third Circuit reached its opinion that the statute “discriminate[d] among students based on the viewpoints they express[ed]”<sup>171</sup> without any discussion as to the parental interests at stake.<sup>172</sup> Instead, the court focused on the balance between the First Amendment rights of students and the interests of the Commonwealth in providing a proper education and curriculum.<sup>173</sup>

### B. *The Florida Approach: Frazier v. Winn*

The Third Circuit’s decision in *Circle School* stands in sharp contrast with the other recent circuit court case involving a state Pledge statute.<sup>174</sup> In the 2006 case of *Frazier v. Winn*, the U.S. Court of Appeals for

---

<sup>164</sup> *Id.* The court also reasoned, given that the purpose of the bill is to support recitation of the Pledge, the bill may have been purposely drafted in a way that would provide a deterrent for opting out. *Id.* at 180–81.

<sup>165</sup> *Id.* at 180.

<sup>166</sup> *Id.* at 181.

<sup>167</sup> *Id.*

<sup>168</sup> *Circle School*, 381 F.3d at 181.

<sup>169</sup> *See id.* In addressing the issue of whether Section 7-771(c)(1) violated the parent plaintiffs’ fundamental liberty interest in the education of their children, the court chose not to render judgment. *Id.* at 183. As the Act was already ruled unconstitutional under the First Amendment, the court stated it was unnecessary to consider its constitutionality under the Fourteenth Amendment. *Id.*

<sup>170</sup> *See* Mawdsley, *supra* note 161, at 13 (noting that these two rights represent the “confluence of two separate lines of educational legal authority in the United States” and arguing that *Circle School* provides insights into the effect of this conflict on the parent-student relationship).

<sup>171</sup> *Circle School*, 381 F.3d at 180.

<sup>172</sup> *See* Mawdsley, *supra* note 161, at 14.

<sup>173</sup> *Circle School*, 381 F.3d at 178.

<sup>174</sup> *See Winn*, 535 F.3d at 1281–86; *Circle School*, 381 F.3d at 180–81.

the Eleventh Circuit reversed a decision of the U.S. District Court for the Southern District of Florida that addressed the constitutionality of a Pledge statute in Florida prohibiting student noncompliance without prior parental permission.<sup>175</sup> The district court had held the Pledge statute unconstitutional, relying heavily on Pledge case law precedents and on the Third Circuit decision in *Circle School*.<sup>176</sup> On appeal, however, the Eleventh Circuit determined that the Pledge statute protected the established rights of parents and was therefore constitutional.<sup>177</sup>

### 1. The Prelude to *Winn*; *Frazier v. Alexandre*

In 2006, the U.S. District Court for the Southern District of Florida upheld the First Amendment right of students to free speech in the case of *Frazier v. Alexandre*.<sup>178</sup> Cameron Frazier refused to recite the Pledge without written permission from his parents.<sup>179</sup> After refusing, Frazier was removed from class and disciplined.<sup>180</sup> Following the occurrence, Frazier brought an action under 42 U.S.C. § 1983.<sup>181</sup> Frazier contended that his refusal to recite the Pledge was in accordance with “his personal political beliefs and convictions”<sup>182</sup> and was therefore protected by the First Amendment.<sup>183</sup> As his First Amendment rights independently excused him from Pledge recitation, Frazier claimed that the parental consent provision was an unconstitutional infringement on that right.<sup>184</sup> The state, in turn, presented a variety of defenses,<sup>185</sup> primarily arguing that the right to noncompliance with Pledge participation lay with the custodial parent and not with the student.<sup>186</sup>

---

<sup>175</sup> See *Winn*, 535 F.3d at 1279, 1285–86, *aff’g in part, rev’g in part Alexandre*, 434 F. Supp. 2d 1350.

<sup>176</sup> *Alexandre*, 434 F. Supp. 2d at 1368; see *infra* notes 178–215 and accompanying text.

<sup>177</sup> See *Winn*, 535 F.3d at 1285–86.

<sup>178</sup> 434 F. Supp. 2d 1352.

<sup>179</sup> See *id.* at 1354.

<sup>180</sup> *Id.*

<sup>181</sup> See *id.* at 1353.

<sup>182</sup> *Id.* at 1352, 1353.

<sup>183</sup> See *id.* at 1353.

<sup>184</sup> *Alexandre*, 434 F. Supp. 2d at 1356.

<sup>185</sup> See *id.* at 1358–68. The state first argued that Frazier lacked standing because he never actually sought parental consent to excuse himself from Pledge participation, and so the statute was never actually applied to him. See *id.* at 1358–62. The court dismissed this claim, noting that Frazier suffered injury-in-fact when he was removed from the classroom and subjected to discipline by school officials. See *id.* at 1362.

<sup>186</sup> See *id.* at 1366.

The district court began by noting that the right at issue in refusing to recite the Pledge belongs to the *student*.<sup>187</sup> Frazier was not challenging daily Pledge recitation in Florida schools or the content of the Pledge.<sup>188</sup> Rather, Frazier objected to the state disregarding his personal political viewpoint and compelling his participation.<sup>189</sup> The court relied heavily on the fundamentals of Pledge recitation law set forth in *Barnette* and on the recent interpretation of *Barnette* by the Third Circuit in *Circle School*.<sup>190</sup> Looking to the Third Circuit's analysis in *Circle School*, the district court confirmed the First Amendment right that guarantees students constitutional authority to refrain from Pledge participation.<sup>191</sup> The court noted that the Florida statute was even more restrictive than the statute at issue in *Circle School*: though the Pennsylvania students had been allowed to decide whether to recite the Pledge, Florida students were not given such a choice.<sup>192</sup>

The district court concluded that parents have a fundamental right to direct the upbringing of their children, particularly in matters concerning custody, care, nurturing, and education,<sup>193</sup> but denied that such a right translates into a requirement for parental consent of children's independent rights.<sup>194</sup> Essentially, the court found no interpretation of *Barnette* that indicated parental consent is necessary prior to children exercising their established First Amendment rights.<sup>195</sup> Because requiring consent would be inconsistent with Supreme Court precedent, the district court granted summary judgment in favor of Frazier and held the Florida statute unconstitutional.<sup>196</sup>

---

<sup>187</sup> See *id.* at 1362–63 (noting that Frazier's refusal to recite the Pledge “over[rode] his conscience and compel[led] his participation”).

<sup>188</sup> *Id.* at 1363.

<sup>189</sup> *Id.*

<sup>190</sup> See *Alexandre*, 434 F. Supp. 2d at 1363–65.

<sup>191</sup> See *id.* at 1365; see also *Barnette*, 319 U.S. at 642; *Circle School*, 381 F.3d at 180–81.

<sup>192</sup> *Alexandre*, 434 F. Supp. 2d at 1365. Although the court did not believe the Pennsylvania statute would chill speech and therefore disagreed with the holding of the Third Circuit, it considered the Florida statute far more restrictive because it “rob[bed] the student of the right to make an independent decision whether to say the pledge.” *Id.*

<sup>193</sup> See *id.* at 1367.

<sup>194</sup> See *id.* at 1368.

<sup>195</sup> See *Alexandre*, 434 F. Supp. 2d at 1362–68; Scott Byers et al., *Mama Knows Best: Frazier v. Winn Says Do as You're Told!*, 63 U. MIAMI L. REV. 905, 911 (2009) (discussing the district court's acknowledgement of sixty years of established “Pledge autonomy”).

<sup>196</sup> *Alexandre*, 434 F. Supp. 2d at 1369.

## 2. The Parental Rights Approach of *Frazier v. Winn*

On appeal, the Eleventh Circuit reversed the district court decision in *Frazier v. Winn* in 2008.<sup>197</sup> The Eleventh Circuit focused on the merits of the facial challenge and the constitutionality of the parental consent provision of the Pledge statute.<sup>198</sup> The court recognized the First Amendment standard as set forth by *Barnette*, and it acknowledged the right of students to refrain from Pledge participation.<sup>199</sup> It quickly proceeded to stress, however, that, as the conflict in *Barnette* was between the state and the rights of the individual, the holding in *Barnette* was not relevant or controlling.<sup>200</sup> Instead, the court decided Frazier's situation was distinctive because, unlike in *Barnette*, students' refusal to participate in the Pledge without parental permission "hinders their parents' fundamental right to control their children's upbringing."<sup>201</sup> Thus, according to the Eleventh Circuit, the district court's reliance on *Barnette* was largely misplaced.<sup>202</sup>

Although the Eleventh Circuit acknowledged that a state has no power to compel student Pledge participation in furtherance of state interests, it opined that a parent does have the right to interfere with the wishes of his child.<sup>203</sup> The court pointed to Supreme Court precedent in its discussion,<sup>204</sup> particularly *Vernonia School District 47J v. Acton*<sup>205</sup> and *Wisconsin v. Yoder*.<sup>206</sup> In 1995, in *Vernonia*, the Supreme Court upheld a school requirement that students submit to random urinalysis testing to be eligible for participation in interscholastic athletics.<sup>207</sup> A student and his parents had challenged this requirement as violative of the Fourth and Fourteenth Amendments.<sup>208</sup> The Eleventh Circuit looked to the

---

<sup>197</sup> *Winn*, 535 F.3d at 1281.

<sup>198</sup> *See id.* at 1282. For a discussion of the portion of the court opinion addressing the statute's requirement that "civilians" stand during the Pledge, see Byers et al., *supra* note 195, at 916–20.

<sup>199</sup> *Winn*, 535 F.3d at 1284.

<sup>200</sup> *See id.* at 1284 & n.5 ("None of the decisions relied upon by Plaintiff and the district court decide the rights of custodial parents in opposition to the rights of their children because, in those cases, the custodial parent was not opposing the child's choice in exercising the child's speech.").

<sup>201</sup> *Id.* at 1284.

<sup>202</sup> *See id.*

<sup>203</sup> *Id.* at 1285 (noting that parents are continually acknowledged as "having the principal role in guiding how their children will be educated on civic values").

<sup>204</sup> *See Winn*, 535 F.3d at 1285.

<sup>205</sup> 515 U.S. 646 (1995).

<sup>206</sup> 406 U.S. 205 (1972).

<sup>207</sup> 515 U.S. at 648, 686.

<sup>208</sup> *Id.* at 648.

section of the *Vernonia* opinion that discussed the role of public school officials as compared to parents and used the opinion to support its conclusion that the parent's right to interfere with the student's fundamental right is greater than the school's.<sup>209</sup> Similarly, the Eleventh Circuit looked to the Supreme Court's 1943 decision in *Yoder* to reinforce the notion that parents have the principal role in guiding their child's education.<sup>210</sup>

The court conclusively held that the state's interest in protecting the rights of parents on educational decisions regarding their children warranted this restriction on students' freedom of speech.<sup>211</sup> Consequently, the Eleventh Circuit reversed the judgment of the district court and held the Florida Pledge statute constitutional.<sup>212</sup>

Essentially, the Eleventh Circuit treated the Florida Pledge statute analysis as a matter of parental rights.<sup>213</sup> The circuit court, unlike the lower court, determined *Barnette* to be inapplicable and thus found it unnecessary to discuss the First Amendment interests at stake for students at schools.<sup>214</sup> As this Note now argues in Part III, by ignoring this issue, the court also ignored how the rights of students are affected, and essentially diminished, by the Florida Pledge statute.<sup>215</sup>

### III. STUDENT RIGHTS SHOULD PREVAIL WHEN IN CONFLICT WITH PARENTAL RIGHTS IN PLEDGE CASES

Although *Frazier v. Winn* and *Circle School v. Pappert* cannot be viewed as creating a direct circuit split between the Eleventh and Third Circuit—given that the Florida and Pennsylvania statutes at issue were somewhat different—the tension between these decisions highlights the lack of clarity regarding student speech rights.<sup>216</sup> *Circle School* es-

---

<sup>209</sup> See *Winn*, 535 F.3d at 1285 (citing *Vernonia*, 515 U.S. at 648–66) (“[W]e also recognize that a parent’s right to interfere with the wishes of his children is stronger than a public school official’s right to interfere on behalf of the school’s own interest.”).

<sup>210</sup> See *id.* (citing *Yoder*, 406 U.S. at 205) (“And this Court and others have routinely acknowledged parents as having the principal role in guiding how their children will be educated on civic values.”).

<sup>211</sup> *Winn*, 535 F.3d at 1285 (“Even if the balance of parental, student, and school rights might favor the rights of a mature high school student in a specific instance, Plaintiff has not persuaded us that the balance favors students in a *substantial* number of instances.”).

<sup>212</sup> See *id.* at 1285–86.

<sup>213</sup> See *id.* at 1284.

<sup>214</sup> See *id.* at 1284–85.

<sup>215</sup> See *id.*; *infra* notes 256–291 and accompanying text.

<sup>216</sup> *Frazier v. Winn*, 535 F.3d 1279, 1284 (11th Cir. 2008); *Circle Sch. v. Pappert*, 381 F.3d 172, 180–81 (3d Cir. 2004); see Byers et al., *supra* note 195, at 939–42 (comparing the Third Circuit and Eleventh Circuit rulings and arguing that “these two decisions cannot be



pouses a fear that student speech may be chilled by parental involvement in the decision-making process regarding expression.<sup>217</sup> By contrast, *Winn* seems to stand for the proposition that student speech can and should be diminished if it conflicts with the right of parents to control the upbringing of their children.<sup>218</sup>

Recently, varying scholars have championed both the *Circle School* decision<sup>219</sup> and the *Winn* decision,<sup>220</sup> while others have simply pointed out the potential circuit split the decisions created; still, no scholars have thoroughly proposed how courts should resolve this issue in future cases.<sup>221</sup> This Note makes such a proposal.<sup>222</sup> In light of the confusion caused by the recent student speech and Pledge cases, there is a substantial tension among public educational institutions, parents, and students.<sup>223</sup> In general, the Supreme Court has seemingly been deferential to school authorities' and administrators' efforts to control the conduct of their students and to promote their educational missions of teaching children and instilling civic values.<sup>224</sup> At the same time, however, the power of schools is clearly restricted by the First Amendment rights of both parents and students.<sup>225</sup> Thus, the question remains: when parent and student agendas conflict, which right should schools protect and promote?<sup>226</sup>

When determining the validity of Pledge statutes, the constitutional rights of students should be determinative, regardless of the opinion or rights of the students' parents.<sup>227</sup> In order to be consistent with the U.S. Supreme Court decision in *West Virginia State Board of Education v. Barnette* in 1943, courts must recognize and promote the First Amendment right of students to free speech in public schools.<sup>228</sup>

---

distinguished in a way to reconcile the apparent conflicts," but proposing no solution to the conflict).

<sup>217</sup> See *Circle School*, 381 F.3d at 180–81.

<sup>218</sup> See *Winn*, 535 F.3d at 1284.

<sup>219</sup> See Whittaker, *supra* note 131, at 165.

<sup>220</sup> Jocelyn Floyd, *The Power of the Parental Trump Card: How and Why Frazier v. Winn Got It Right*, 85 CHI.-KENT L. REV. 791, 804–10 (2010).

<sup>221</sup> See, e.g., Byers et al., *supra* note 195, at 939–42.

<sup>222</sup> See *infra* notes 307–331 and accompanying text.

<sup>223</sup> See *infra* notes 307–331 and accompanying text.

<sup>224</sup> See *Morse v. Frederick*, 551 U.S. 393, 407–10 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–73 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986).

<sup>225</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

<sup>226</sup> See *infra* notes 307–331 and accompanying text.

<sup>227</sup> See *infra* notes 307–331 and accompanying text.

<sup>228</sup> See *Barnette*, 319 U.S. at 637; see *infra* notes 256–306 and accompanying text.

Moreover, as courts typically defer to governmental interests in school cases and cite the significance of the educational mission to create effective, democratic citizens, it seems contradictory to then hold parental interests greater than the free speech interests of students.<sup>229</sup>

A. *The Importance and Applicability of West Virginia State Board of Education v. Barnette*

The Supreme Court's decision in *Barnette*, which has never been overruled, is a clear enunciation of the First Amendment right to free speech and expression public school students possess today.<sup>230</sup> And although *Barnette* is the first in a line of student speech cases, it is also the only Supreme Court case dealing directly and explicitly with the Pledge in public schools.<sup>231</sup> In *Barnette*, the Court made clear that compulsory recitation of the Pledge in schools is inconsistent with a Bill of Rights that protects the right of individuals to speak their own minds.<sup>232</sup> The fortification of this right is particularly important within the context of schools.<sup>233</sup> The *Barnette* Court noted the special and highly discretionary function of schools in educating our youth for citizenship.<sup>234</sup> Schools are responsible for teaching the fundamental underpinnings of our government and the rights possessed by citizens thereby governed.<sup>235</sup> With this understanding in mind, the Court reasoned that to teach children the principles of our Constitution but then choose not to practice these principles is bad policy.<sup>236</sup> Thus, while no official authority can evade the reach of the Constitution, it is especially pertinent that school officials be held to the highest of constitutional standards.<sup>237</sup>

Most importantly, in addressing the constitutionality of the Pledge statute at issue, the *Barnette* Court did not ground its reasoning in the

---

<sup>229</sup> See *infra* notes 317–327 and accompanying text.

<sup>230</sup> See *Barnette*, 319 U.S. at 641–42; *supra* notes 34–50 and accompanying text.

<sup>231</sup> See *Barnette*, 319 U.S. at 641–42; see also Papandrea, *supra* note 55, at 1038–53 (discussing the history of student speech rights).

<sup>232</sup> See *Barnette*, 319 U.S. at 634. The Supreme Court noted that “compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.” *Id.* at 633.

<sup>233</sup> See *id.* at 637.

<sup>234</sup> See *id.*

<sup>235</sup> See *id.*; Garvey, *supra* note 31, at 341 (noting that the *Barnette* Court “devoted some attention to the kinds of social benefits that accrue from the formation of thinking citizens”).

<sup>236</sup> See *Barnette*, 319 U.S. at 637 (“That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”).

<sup>237</sup> See *id.* at 637, 642. The Court noted that if there are any circumstances which permit an exception to this general idea, “they do not now occur to us.” *Id.* at 642.

rights of parents.<sup>238</sup> In fact, the rights of parents under the Fourteenth Amendment were never discussed.<sup>239</sup> Although one could argue that there was no cause to discuss parental rights in that instance because the students and parents, all Jehovah's Witnesses, espoused the same belief, that assumption was never stated by the Court.<sup>240</sup> Instead, the Court focused on the right of students to possess their *own* views.<sup>241</sup> This right to free speech and expression must be respected by the states, independent of the opinions or viewpoints of the parents of students.<sup>242</sup>

B. *Distinguishing Other Supreme Court Student Speech Cases:  
Pledge Recitation as Compelled Political Speech*

To understand the constitutional rights of students and parents with regard to Pledge statutes, it is also important to distinguish Pledge cases from other recent Supreme Court student speech jurisprudence.<sup>243</sup> In the 1986 case of *Bethel School District No. 403 v. Fraser*, the 1988 case of *Hazelwood School District v. Kuhlmeier*, and the 2007 case of *Morse v. Frederick*, the Supreme Court seemingly narrowed the First Amendment rights of students in schools by deferring to the decisions of school officials.<sup>244</sup> Thus, it may initially appear that students now possess limited free speech rights.<sup>245</sup> It is crucial, however, to take note of the factual circumstances at issue in each of these cases.<sup>246</sup> For instance, the student speech at issue in *Fraser* was sexually explicit and thus, deemed inappropriate for a young audience.<sup>247</sup> *Kuhlmeier*, too, involved speech re-

---

<sup>238</sup> See *id.* at 625–42. The only real discussion of parents in *Barnette* involved the recognition that parents of children who have refused to recite the Pledge have in some instances “been prosecuted and are threatened with prosecutions for causing delinquency.” See *id.* at 630.

<sup>239</sup> See *id.* at 625–42.

<sup>240</sup> See *id.* A similar question arose in 1969, in the case of *Tinker v. Des Moines Independent Community School District* because, although the Court recognized the right of students to free speech, the students maintained the same viewpoint as their parents in regards to the Vietnam War. See *Tinker*, 393 U.S. at 504; Mawdsley, *supra* note 18, at 179–80 (“What *Tinker* did not address was how a court should deal with students’ rights where student views differed from those of their parents.”).

<sup>241</sup> See *Barnette*, 319 U.S. at 633–34.

<sup>242</sup> See *infra* notes 307–331 and accompanying text.

<sup>243</sup> See *infra* notes 244–255 and accompanying text.

<sup>244</sup> See *Morse*, 551 U.S. at 407–10; *Kuhlmeier*, 484 U.S. at 270–73; *Fraser*, 478 U.S. at 685–86.

<sup>245</sup> See *Morse*, 551 U.S. at 407–10; *Kuhlmeier*, 484 U.S. at 270–73; *Fraser*, 478 U.S. at 685–86.

<sup>246</sup> See *Morse*, 551 U.S. at 407–10; *Kuhlmeier*, 484 U.S. at 270–73; *Fraser*, 478 U.S. at 685–86; *infra* notes 247–250 and accompanying text.

<sup>247</sup> See *Fraser*, 478 U.S. at 675, 683 (“The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech . . .”).

garding sexual activity and birth control—subjects considered inappropriate for the school environment.<sup>248</sup> Also determinative in *Kuhlmeier* was the fact that the speech was printed in the school-funded newspaper and therefore could reasonably be perceived as endorsed by the school.<sup>249</sup> Lastly, the *Morse* Court was clear that its holding restricting student speech was limited to speech reasonably perceived as promoting illegal drug use.<sup>250</sup>

In contrast, cases discussing the constitutionality of Pledge statutes, like *Barnette*, *Circle School*, and *Winn*, involve political speech.<sup>251</sup> Like the student wearing the black armband to oppose the Vietnam War in the Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*, participation or refusal to recite the Pledge represents a particular political viewpoint.<sup>252</sup> Compelling students to espouse or suppress particular political viewpoints directly contradicts the purpose of the First Amendment.<sup>253</sup> As such, Pledge cases are distinct from other student speech cases, and Supreme Court rulings in cases like *Fraser*, *Kuhlmeier*, and *Morse* are not applicable.<sup>254</sup> Rather, cases involving political speech in schools, like *Barnette* and *Tinker*, stand as relevant case law.<sup>255</sup>

#### C. *Why Frazier v. Winn Was Wrongly Decided: The Decision's Incompatibility with West Virginia State Board of Education v. Barnette*

The Eleventh Circuit decision in *Winn* is incompatible with the Supreme Court holding in *Barnette* and was therefore wrongly decided.<sup>256</sup> A proper reading and understanding of *Barnette* illuminates

---

<sup>248</sup> See *Kuhlmeier*, 484 U.S. at 263.

<sup>249</sup> See *id.* at 271.

<sup>250</sup> See *Morse*, 551 U.S. at 408 (“The special characteristics of the school environment, and the governmental interest in stopping student drug use . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.” (internal citation omitted)).

<sup>251</sup> See *Barnette*, 319 U.S. at 632–34; *Winn*, 535 F.3d at 1284; *Circle School*, 381 F.3d at 178; *infra* notes 252–255 and accompanying text.

<sup>252</sup> See *Tinker*, 393 U.S. at 505–06.

<sup>253</sup> See *id.* at 513–14.

<sup>254</sup> Compare *Morse*, 551 U.S. at 407–10, *Kuhlmeier*, 484 U.S. at 270–73, and *Fraser*, 478 U.S. at 685–86, with *Barnette*, 319 U.S. at 642, *Winn*, 535 F.3d at 1284–86, and *Circle School*, 381 F.3d at 180–81.

<sup>255</sup> See *Tinker*, 393 U.S. at 511; *Barnette*, 319 U.S. at 642.

<sup>256</sup> See *Barnette*, 319 U.S. at 642; *Winn*, 535 F.3d at 1284–86; Whittaker, *supra* note 131, at 65 (discussing *Winn*'s “troubling precedent” and arguing that other circuits should not adopt *Winn*'s holding as it “stands in direct contrast to decades of First Amendment jurisprudence and provides the state with almost limitless authority to violate constitutional rights of minors by appealing to parental authority”).

the key divergence between the approach taken by the Third Circuit in *Circle School* and the district court for the Southern District of Florida in *Frazier v. Alexandre* on one hand, and the approach taken by the Eleventh Circuit in *Winn* on the other hand.<sup>257</sup> In *Winn*, the Eleventh Circuit upheld the constitutionality of the Florida statute that required students to recite the Pledge unless the student had written parental permission excusing him or her from Pledge participation.<sup>258</sup> The Eleventh Circuit mentioned the First Amendment standard set forth in *Barnette*, but determined that the case did not apply and therefore was not controlling.<sup>259</sup> The Eleventh Circuit noted that though *Barnette* ruled that compulsive Pledge participation violates the Constitution, the refusal of students to participate did “not interfere with or deny rights of others to do so . . . . The sole conflict [in *Barnette* was] between authority and rights of the individual.”<sup>260</sup> As such, the *Winn* court determined that *Barnette* was not applicable because the Supreme Court in that case was considering a controversy not between students and the government, but between parents and the school.<sup>261</sup> The decision completely ignored the issue of students’ rights.<sup>262</sup> The Eleventh Circuit pointed to *Wisconsin v. Yoder* as an example of the Supreme Court acknowledging parents as having the primary role in controlling the civic education of their children.<sup>263</sup> This, however, is a misguided application of Supreme Court jurisprudence,<sup>264</sup> as the parents’ and students’ beliefs and wishes were not conflicting in *Yoder*.<sup>265</sup> In fact, Justice Douglas’s dissent in that case was the first recognition children’s interests may not always be represented by their parents.<sup>266</sup> Justice Douglas indicated that

---

<sup>257</sup> See *Barnette*, 319 U.S. at 630–42; *Winn*, 535 F.3d at 1283–86; *Circle School*, 381 F.3d at 177–81; *Frazier v. Alexandre*, 434 F. Supp. 2d 1350, 1362–68 (S.D. Fla. 2006), *aff’d in part, rev’d in part sub nom.* *Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008).

<sup>258</sup> See *Winn*, 535 F.3d at 1285–86 (“To the degree that the district court’s judgment invalidates the written request by . . . parent requirement of the Pledge Statute, the judgment is reversed.” (internal quotation omitted)).

<sup>259</sup> *Id.* at 1284 (“We see the statute before us now as largely a parental-rights statute. As such, this case is different from *Barnette*.”).

<sup>260</sup> See *id.*

<sup>261</sup> See *id.* The court held that here the state was advancing the constitutional rights of parents, “an interest which the State may lawfully protect.” *Id.*

<sup>262</sup> See *id.*

<sup>263</sup> See *id.* at 1285 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 232–34 (1972)).

<sup>264</sup> See *Winn*, 535 F.3d at 1285; see also *infra* notes 265–267 and accompanying text.

<sup>265</sup> *Yoder*, 406 U.S. at 208–09. Moreover, there is debate as to whether *Yoder* may be limited to instances where the liberty threatened involves religious beliefs. See Mawdsley, *supra* note 18, at 172.

<sup>266</sup> See *Yoder*, 406 U.S. at 244–46 (Douglas, J., dissenting). Justice Douglas stated that parents “normally speak for the entire family,” but that “[i]t is the student’s judgment, not

*Yoder* may have been decided differently had the children involved desired to continue to attend public school at age fourteen against the will of their Amish parents.<sup>267</sup>

The Eleventh Circuit also inappropriately relied on the Supreme Court's decision in 1995 in the case of *Vernonia School District v. Acton* to support its holding.<sup>268</sup> This reliance is misplaced for two reasons.<sup>269</sup> First, although *Vernonia* did address the role of school officials vis-à-vis parents with respect to students' rights, the discussion was in the context of a student's Fourth Amendment protection against unreasonable search and seizure.<sup>270</sup> The decision involved neither the First Amendment free speech rights of students nor a challenge by parents that the school policy at issue infringed upon their right to direct the upbringing of their children.<sup>271</sup> Secondly, the *Vernonia* Court clearly reasserted the discretionary authority of school officials and their "custodial and tutelary responsibility" over children.<sup>272</sup> The Court's purpose in discussing the reality that minors are subject to the control of their parents was to clarify the role of public schools, not to diminish the rights of students.<sup>273</sup> Public schools do not maintain parental power over students because such power would be inconsistent with previous cases discussing the Free Speech Clause, which treat school officials like state actors.<sup>274</sup> The Court in no way indicated that the rights of school officials or of students within schools are limited by the rights of parents.<sup>275</sup> Thus, the use of *Vernonia* by the Eleventh Circuit in *Winn* to support

---

his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny." *Id.* at 244–45; see Mawdsley, *supra* note 18, at 180 (discussing Justice Douglas's dissent).

<sup>267</sup> See *Yoder*, 406 U.S. at 244–46 (Douglas, J., dissenting).

<sup>268</sup> See *Winn*, 535 F.3d at 1285 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648–66 (1995)).

<sup>269</sup> See *id.*; see also *infra* notes 270–276 and accompanying text.

<sup>270</sup> See *Vernonia*, 515 U.S. at 651–52 (plaintiffs filed suit alleging the school district adopted a drug policy that violated their rights under the Fourth and Fourteenth Amendments); see *supra* notes 204–210 and accompanying text.

<sup>271</sup> See *Vernonia*, 515 U.S. at 648–66.

<sup>272</sup> See *id.* at 656 ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.").

<sup>273</sup> See *id.*

<sup>274</sup> *Id.* at 655.

<sup>275</sup> See *id.* at 648–66.

giving more weight to parents' rights than students' rights in schools was inapposite.<sup>276</sup>

Moreover, the argument that the *Winn* court in fact met the requirements of *Barnette* by offering an opt-out provision and the ability for refusal<sup>277</sup> is flawed because the opt-out provision was still conditioned on parental approval.<sup>278</sup> Because the Florida students could not independently choose to refrain from Pledge participation, *Winn* directly conflicts with *Barnette*.<sup>279</sup>

The Eleventh Circuit's conclusion that the state's interest in protecting the rights of parents is a sufficient justification for limiting the rights of students, was also unsound.<sup>280</sup> The Eleventh Circuit even hinted at its own confusion on the matter of student speech.<sup>281</sup> The end of the decision stated that although the balance among parental, student, and school rights *may* favor the rights of some students, the court was not convinced that the balance favors students in a substantial number of instances.<sup>282</sup> This statement suggests that though some students may have rights, other students do not—an idea completely unfounded and not fully explained.<sup>283</sup> By ending the decision in this way, the Eleventh Circuit arguably cast the logical underpinnings of its entire opinion into doubt.<sup>284</sup> Rather than confront all the issues and pro-

---

<sup>276</sup> See *Winn*, 535 F.3d at 1285; see also *supra* notes 269–275 and accompanying text. *Contra* Floyd, *supra* note 220, at 806 (arguing that *Vernonia* reasserted that “a minor’s rights of self-determination . . . remain at the control of his parents”).

<sup>277</sup> See Floyd, *supra* note 220, at 818.

<sup>278</sup> See *Winn*, 535 F.3d at 1281.

<sup>279</sup> See *Barnette*, 319 U.S. at 642; *Winn*, 535 F.3d at 1281.

<sup>280</sup> See *Winn*, 535 F.3d at 1285; see also *infra* notes 281–284 and accompanying text.

<sup>281</sup> See *Winn*, 535 F.3d at 1285.

<sup>282</sup> See *id.*

Even if the balance of parental, student, and school rights might favor the rights of a mature high school student in a specific instance, Plaintiff has not persuaded us that the balance favors students in a *substantial* number of instances . . . relative to the total number of students covered by the statute.

*Id.*

<sup>283</sup> See *id.* In fact the Eleventh Circuit concluded its decision by stressing that “we decide and hint at nothing about the Pledge Statute’s constitutionality as applied to a specific student or a specific division of students.” *Id.* at 1286; see also *Morgan v. Swanson*, 610 F.3d 877, 884–85 (5th Cir. 2010) (noting that *Barnette* involved elementary school students and therefore, while the rights of elementary students may not be coextensive with the rights of high school students, elementary students nevertheless are still protected by the First Amendment’s Free Speech Clause).

<sup>284</sup> See *Winn*, 535 F. 3d at 1285.

vide clarity, the Eleventh Circuit allowed the parental rights issue to overpower and eliminate the students' rights issue.<sup>285</sup>

Although the *Winn* court is correct in recognizing that the conflict here is not one simply between the rights of students and the rights of schools, this is not a justification for finding *Barnette* inapplicable.<sup>286</sup> The established rights of students do not disappear merely because their parents have a viewpoint.<sup>287</sup> Thus, the rights of students cannot and should not be removed from the constitutional equation.<sup>288</sup> Moreover, it cannot be said that the role and rights of schools are uninvolved because it is school officials—enforcers of Pledge recitation—who explicitly deny students their First Amendment right by protecting the rights of parents.<sup>289</sup> Any case that denies individuals—in this case students—the liberty to express their own political beliefs without a proper consideration of the constitutional liberties at issue is suspect.<sup>290</sup> As the facts of *Winn* confront the conflict among students, parents, and schools, a proper consideration and balance must be reached among the rights of all three parties, with significant weight accorded to the First Amendment right of students.<sup>291</sup>

#### D. *Why Circle School v. Pappert and Frazier v. Alexandre Were Correctly Decided*

The Third Circuit's 2004 holding in *Circle School* and the Florida federal district court's 2006 holding in *Alexandre*, later overturned by the Eleventh Circuit in *Winn*, are consistent with *Barnette* and therefore were correctly decided.<sup>292</sup> Primarily, the Third Circuit acknowledged that the student, individually and independently, possesses a First Amendment right in the school setting.<sup>293</sup> The Third Circuit agreed with the lower

---

<sup>285</sup> See *id.* at 1283–86.

<sup>286</sup> See *id.* at 1284–85; see also *infra* notes 287–291 and accompanying text.

<sup>287</sup> See Byers et al., *supra* note 195, at 924–25 (discussing the Eleventh Circuit decision and arguing that “[t]he fundamental right to freedom of speech deserves more than this summary dismissal”).

<sup>288</sup> See *id.*

<sup>289</sup> See, e.g., *Alexandre*, 434 F. Supp. 2d at 1354 (noting that when Frazier refused to recite the Pledge without parental permission, it was his *teacher* who ascertained he was violating the statute, and it was his principal who did not allow him to return to his classroom for the remainder of the day).

<sup>290</sup> See Byers et al., *supra* note 195, at 924–25 (“[T]he court should have applied strict scrutiny, as the fundamental rights of minors are infringed on by the statute.”).

<sup>291</sup> See *Winn*, 535 F.3d at 1283–86; see also *infra* notes 307–331 and accompanying text.

<sup>292</sup> See *Barnette*, 319 U.S. at 642; *Winn*, 535 F.3d at 1285–86; *Circle School*, 381 F.3d at 181; *Alexandre*, 434 F. Supp. 2d at 1368.

<sup>293</sup> *Circle School*, 381 F.3d at 177 (citing *Tinker*, 393 U.S. at 506).



court that the parental-notification requirement of the Pennsylvania Pledge statute infringed upon this free speech right by discriminating among students based on their viewpoint.<sup>294</sup> Specifically, the parental notification provision of the Pennsylvania statute was only triggered when a student chose to exercise his First Amendment right by *not* reciting the Pledge.<sup>295</sup> Thus, to be constitutionally valid, the statute needed to withstand strict scrutiny analysis.<sup>296</sup> The same type of analysis should have been applied by the Eleventh Circuit in *Winn*.<sup>297</sup> The Florida statute, like the Pennsylvania statute, was only triggered when a student wanted to refrain from Pledge participation.<sup>298</sup> That is, a Florida student did not need parental permission to recite the Pledge but did need parental permission to refrain from doing so.<sup>299</sup> Thus, the Florida statute also amounted to viewpoint discrimination and should have been subject to strict scrutiny analysis.<sup>300</sup>

Importantly, in *Alexandre* the Florida district court also recognized the invalidity of the parental permission clause of the Florida Pledge statute.<sup>301</sup> The district court relied heavily on the decisions of both *Circle School* and *Barnette* in its analysis.<sup>302</sup> It recognized the right at issue as one that belonged to the student, a right long-established by *Barnette*.<sup>303</sup> It also rightfully and openly acknowledged the role parents play in the lives of their children, including rights concerning custody, care, nurturing, and education.<sup>304</sup> Still, the district court was clear in stating that

---

<sup>294</sup> See *id.* at 180 (stating that the parental notification clause “clearly discriminates among students based on the viewpoints they express”).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* In *Circle School*, the Pennsylvania statute failed strict scrutiny because it “simply serve[d] an administrative function, designed to efficiently inform all parents of an aspect of their children’s education.” *Id.* at 181.

<sup>297</sup> See *id.* at 180–81; Byers et al., *supra* note 195, at 925 (opining that strict scrutiny analysis should have been applied to this statute by the Eleventh Circuit).

<sup>298</sup> See FLA. STAT. ANN. § 1003.44(1) (West 2009); 24 PA. STAT. ANN. § 7-771(c)(1) (West 1992).

<sup>299</sup> FLA. STAT. ANN. § 1003.44(1); see *Winn*, 535 F.3d at 1281 (noting that the Florida statute stated “that the student has the right *not* to participate in reciting the pledge . . . [u]pon written request by his or her parent” (emphasis altered)).

<sup>300</sup> See FLA. STAT. ANN. § 1003.44(1); *Circle School*, 381 F.3d at 180–81.

<sup>301</sup> See *Alexandre*, 434 F. Supp. 2d at 1368.

<sup>302</sup> See *id.* at 1365. It should be noted that the district court disagreed with the holding in *Circle School* and disagreed with the Third Circuit’s opinion that parental notification would chill student speech. See *id.* The district court did, however, find the written consent provision of the Florida statute to be much more restrictive than the Pennsylvania statute considered in *Circle School*. See *id.*

<sup>303</sup> See *id.* (“Since *Barnette*, federal courts have established a body of caselaw that irrefutably recognizes the right of students to remain silent and seated during the pledge.”).

<sup>304</sup> See *id.* at 1367.

the established constitutional rights of the child are not dependent on approval by the parent.<sup>305</sup> If they were dependent, then all the previous Pledge cases would have had different outcomes as parental rights in the educational sphere were recognized prior to *Barnette*.<sup>306</sup>

#### IV. PROPOSAL FOR DETERMINING THE CONSTITUTIONAL VALIDITY OF PLEDGE STATUTES

When courts confront Pledge issues in the future, they should follow the U.S. Court of Appeals for the Third Circuit's 2004 decision in *Circle School v. Pappert* that students' rights carry more weight than parental rights.<sup>307</sup> First and foremost, courts must acknowledge students' First Amendment right to free speech, first asserted by the Supreme Court in *Barnette* decades ago.<sup>308</sup> This right is in no way dependent on other constitutional rights, including the Fourteenth Amendment right of parents to control the upbringing and education of their children.<sup>309</sup> If these rights were co-dependent, the holding of *Barnette* would not have been necessary.<sup>310</sup> Recognition of the free speech right of students in schools encompasses the right to refrain from Pledge participation.<sup>311</sup> This right should exist irrespective of parental approval or notification.<sup>312</sup> Thus, when confronting a Pledge statute that involves parents and their rights within schools, the key issue will be deciding if the statute unreasonably infringes upon the independent right of the student.<sup>313</sup> Had the Eleventh Circuit in *Frazier v. Winn* made such a determination, the decision would have been resolved differently.<sup>314</sup>

---

<sup>305</sup> See *id.* at 1368 (“[T]his right does not translate into a requirement that a parent must give prior approval of a child’s exercise of First Amendment rights in a school setting.”).

<sup>306</sup> See *id.*

<sup>307</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Circle Sch. v. Pappert*, 381 F.3d 172, 180–81 (3d Cir. 2004); *infra* notes 308–331 and accompanying text. For a similar view, see Tess Slattery, Note, *Freedom from Compulsion*, 85 CHI-KENT L. REV. 819, 841–44 (2010).

<sup>308</sup> See *Barnette*, 319 U.S. at 642; *supra* notes 34–50 and accompanying text.

<sup>309</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

<sup>310</sup> See *Frazier v. Alexandre*, 434 F. Supp. 2d 1350, 1368 (S.D. Fla. 2006), *aff’d in part, rev’d in part sub nom.* *Frazier v. Winn*, 535 F.3d 1279, 1279 (11th Cir. 2008).

<sup>311</sup> See *Barnette*, 319 U.S. at 642; *Circle School*, 381 F.3d at 178.

<sup>312</sup> See *Circle School*, 381 F.3d at 180–81; *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616, 623–26 (E.D. Pa. 2003), *aff’d sub nom.* *Circle Sch. v. Pappert*, 381 F.3d 172 (3d Cir. 2004); *Alexandre*, 434 F. Supp. 2d at 1368.

<sup>313</sup> See *Circle School*, 381 F.3d at 180–81. In most instances, any parental involvement is likely required by legislators to encourage Pledge recitation by students; these provisions will therefore be likely to restrict students’ speech rights. See *id.* Thus, many Pledge statutes involving parental rights may be presumptively unconstitutional. See *id.*; Whittaker, *supra* note 131, at 65 (arguing, in the context of First Amendment rights, that “the state must

To statutorily restrict students' independent rights to refrain from reciting the Pledge, a state must meet strict scrutiny and thus must prove the statute is narrowly tailored to further a compelling interest.<sup>315</sup> Under strict scrutiny, a state may argue that such a statute protects the right of parents to direct the education of their children.<sup>316</sup> As the Third Circuit makes clear, however, the safeguarding of parental rights does not amount to a compelling governmental interest.<sup>317</sup> Moreover, even had the Third Circuit not rendered this opinion, logical reasoning suggests that parental rights should not diminish the constitutional rights of students in schools.<sup>318</sup>

There may be an argument that placing more weight towards parental rights is consistent with the recent trend in Supreme Court jurisprudence to restrict the First Amendment rights of students.<sup>319</sup> Although cases subsequent to *Barnette* and the 1969 Supreme Court case, *Tinker v. Des Moines Independent School District*—like the Court's decisions in the 1986 case of *Bethel v. Fraser*, the 1988 case of *Hazelwood v. Kuhlmeier*, and the 2007 case of *Morse v. Frederick*—do restrict the free speech rights of students in schools, each of these cases can be read narrowly as applying only in particular circumstances.<sup>320</sup> For instance, *Morse* involved drug-related speech and *Fraser* involved sexually explicit speech.<sup>321</sup> Pledge cases, however, involve political speech.<sup>322</sup> As espoused in *Tinker*, political speech is particularly important and is protected under the First Amendment.<sup>323</sup>

---

provide compelling justifications for intrusions on constitutional liberties independent from the rights of parents”).

<sup>314</sup> See 535 F.3d at 1285.

<sup>315</sup> See *Circle School*, 381 F.3d at 180.

<sup>316</sup> See *id.* at 180–81.

<sup>317</sup> *Id.* at 181 (citing *Phillips*, 270 F. Supp. 2d at 624) (“[T]he Commonwealth’s stated interest of parental notification is simply not ‘so compelling of an interest’ as to justify the viewpoint discrimination that significantly infringes students’ First Amendment rights.”).

<sup>318</sup> See *infra* notes 319–331 and accompanying text.

<sup>319</sup> See *Morse v. Frederick*, 551 U.S. 393, 408 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986).

<sup>320</sup> See *Morse*, 551 U.S. at 408; *Kuhlmeier*, 484 U.S. at 271–72; *Fraser*, 478 U.S. at 685–86.

<sup>321</sup> See *Morse*, 551 U.S. at 408; *Fraser*, 478 U.S. at 675, 682–83.

<sup>322</sup> See *Barnette*, 319 U.S. at 633 (discussing the political nature of the flag salute and Pledge and stating that “[h]ere it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks.”).

<sup>323</sup> See *Tinker*, 393 U.S. at 513–14 (“They wore [the black armbands] to exhibit their disapproval of the Vietnam hostilities . . . . [O]ur Constitution does not permit officials of the State to deny their form of expression.”).

Moreover, even if these cases are read broadly as espousing a general limitation on students' free speech rights in the classroom, the cases present issues that are easily distinguishable from the issues involved in Pledge cases.<sup>324</sup> Specifically, these cases involve deference to school officials' judgment when action is taken to control conduct in the school environment and to further the educational mission of schools.<sup>325</sup> Such deference is afforded even when parents support the conduct of their children that was disallowed by schools.<sup>326</sup> Thus, if courts are largely deferential to schools in spite of parents, then schools should not protect parental rights at the expense of student expression when it comes to Pledge issues.<sup>327</sup>

This is not to suggest that all Pledge statutes touching on parental rights are constitutionally invalid.<sup>328</sup> For instance, there is nothing inherently wrong with notification to parents that a school offers Pledge exercises daily or that an opt-out opportunity is available.<sup>329</sup> This serves the "administrative function" addressed by the Third Circuit in *Circle Schools* and involves no viewpoint discrimination because such notification is not triggered by a student's decision of compliance or noncompliance with Pledge recitation.<sup>330</sup> As long as the First Amendment rights of students are not diminished at the hands of parental rights, a statute may survive constitutional analysis.<sup>331</sup>

#### CONCLUSION

The relationship among parents, students, and public educational institutions has been the source of much debate for courts and scholars

---

<sup>324</sup> See *Morse*, 551 U.S. at 408; *Kuhlmeier*, 484 U.S. at 271–72; *Fraser*, 478 U.S. at 685–86; *Tinker*, 393 U.S. at 513–14.

<sup>325</sup> See *Morse*, 551 U.S. at 408; *Kuhlmeier*, 484 U.S. at 271–72; *Fraser*, 478 U.S. at 685–86; *Tinker*, 393 U.S. at 513–14; Papandrea, *supra* note 55, at 1045 (discussing the more recent student speech cases and noting that the Supreme Court has been "increasingly deferential to school officials who punish students for their expressive activities").

<sup>326</sup> See *Fraser*, 478 U.S. at 679. For instance, in *Fraser*, parents brought suit along with their minor children. See *id.*

<sup>327</sup> See Papandrea, *supra* note 55, at 1084 ("Permitting schools to act in the name of supporting parental rights is a false legal fiction that simply grants school officials broad authority to engage in censorship of speech that they do not like.").

<sup>328</sup> See *Phillips*, 270 F. Supp. 2d at 624.

<sup>329</sup> See *Circle Schools*, 381 F.3d at 181; *Phillips*, 270 F. Supp. 2d at 624 ("There is no reason why a generalized notice to all parents would not be completely sufficient.").

<sup>330</sup> See *Circle Schools*, 381 F.3d at 181 ("It appears just as likely, if not more likely, that notification to all the school's parents at one time, possibly along with other notices sent at the beginning of the school year, would actually conserve administrative resources.").

<sup>331</sup> See *id.*

over the past century. Recently, Pledge statutes, enforced in public high schools, have created an interesting tension among the First Amendment right of students to free speech, the Fourteenth Amendment right of parents to control the upbringing of their children, and the right of schools to control conduct. The Supreme Court's landmark decision in the 1943 case of *West Virginia State Board of Education v. Barnette* clearly espouses the independent right of students to refrain from Pledge participation.<sup>332</sup> Recent cases, however, challenge the reach of this ruling when the right of the student conflicts with the right of the parent. Such cases focus on the established right of parents to direct the education of their children under the Fourteenth Amendment. Specifically, the decisions issued by the Eleventh Circuit in *Frazier v. Winn* and the Third Circuit in *Circle School v. Pappert* create conflicting and confusing legal precedent.<sup>333</sup> As a result, the appropriate legal approach to Pledge cases, and the proper balance to be found among the rights of students, parents, and public schools, is unclear. This Note, in response, proposes a way for courts to confront Pledge statutes in the future and argues that the key issue will be deciding if the statute unreasonably infringes upon the independent First Amendment right of the student. In order to remain consistent with Supreme Court jurisprudence regarding the Pledge, courts must protect and promote the First Amendment right to freedom of speech and expression possessed by students in the school environment, specifically when that right conflicts with parental desires.

LAURA PRIESTON

---

<sup>332</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>333</sup> See *Frazier v. Winn*, 535 F.3d 1279, 1284 (11th Cir. 2008); *Circle Sch. v. Pappert*, 381 F.3d 172, 180–81 (3d Cir. 2004).